TRENGGANU FOREST PRODUCTS SDN BHD A

v.

COSCO CONTAINER LINES & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
RAMLY ALI J
[SUIT NO: D5-22-412-1997]
3 MAY 2007

CIVIL PROCEDURE: *Striking out - Filing of unconditional appearance - Whether a bar to striking out application - Rules of the High Court 1980, O. 18 r. 19* C

CIVIL PROCEDURE: *Striking out - Striking out pleading or indorsement - Discretion of court to strike out pleading or indorsement or anything at any stage of proceedings to avoid wasting time and resources on a plea that is bound to fail* D

SHIPPING: *Carriage of goods - Contract of affreightment - Outward-bound cargoes - Fraudulent misrepresentation in bill of lading by carrier - Liability of carrier - The Hague Rules - Whether applicable - Whether claim time-barred under Hague Rules and Carriage of Goods by Sea Act 1980 (Act 527)* E

The plaintiff had agreed to sell 56 containers of plywood ("the said cargo") to a buyer in China. The terms of the contract of sale, F
inter alia, stated that the shipment must be made before 30 April 1994. The plaintiff then entered into a contract of carriage with the defendants, as the carrier for the said cargo. The defendants issued and/or represented the said Bill of Lading as "shipped on board" on 30 April 1994. In reliance of the said representations G
on the Bill of Lading, the plaintiff submitted the documents including the Bill of Lading dated 30 April 1994 to the negotiating bank for due payment pursuant to a letter of credit. The buyer later rescinded the contract of sale, rejected the said cargo and prevented the release of funds pursuant to the letter of credit. In H
the arbitration between the buyer and the plaintiff, an award of compensation was made against the plaintiff. The plaintiff then claimed against the defendants in respect of loss and damage suffered by the plaintiff as a result of the fraudulent misrepresentation in the Bill of Lading by the defendants which the I
plaintiff claimed to have breached the implied term of the contract of carriage.

The 1st defendant applied to strike out the plaintiff's amended writ and statement of claim under O. 18 r. 19(1)(b), (c) and (d) of the RHC 1980 on the ground that the plaintiff's claim was time-barred under the Carriage of Goods by Sea Act 1980 (Act 527) (COGSA) and the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of Brussels 1924 (the Hague Rule 1924). The plaintiff claimed that the Hague Rules do not extend to tortuous liabilities arising under the Bill of Lading. The issues before the court were, *inter alia*: (a) whether the plaintiff's claim against the 1st defendant fell under the purview of the Hague Rules and COGSA and (b) whether the plaintiff's claim against the 1st defendant could be struck out for being time-barred.

Held (allowing the 1st defendant's application with costs):

(1) The COGSA gives force to the Hague Rules and provides for it's compulsory application to Bills of Lading and similar documents of title issued in relation to outward-bound cargoes. In the present case, the plaintiff's claim against the 1st defendant was based on the Bill of Lading in connection with the carriage of goods by sea in ship from Malaysia outward-bound to China. Therefore, the relevant provisions of the COGSA and the Hague Rules 1924 were compulsorily applicable. (paras 21 & 24)

(2) The date when the goods were or should have been delivered, was 27 May 1994. Therefore, any action, claim or suit in respect of loss or damage against the 1st defendant (as the carrier) had to be brought or filed within one (1) year after 27 May 1994. The present suit was only instituted in Malaysia against the 1st defendant on 28 July 1997, some three (3) years later. The suit was filed beyond the limitation period of one (1) year after 17 May 1994. The plaintiff's claim against the 1st defendant was time-barred under art. III, r. 6 of the Hague Rules and the COGSA. (paras 25, 28 & 29)

(3) There is nothing in O. 18 r. 19 of the RHC 1980, stating that to strike out the writ and statement of claim a conditional appearance must be filed first or that once an unconditional appearance has been filed, an interested party is precluded from making an application of striking out on the given grounds. In other words, the filing of a conditional appearance

is not a prequisite for the filing of an O. 18 r. 19 application. Order 18 r. 19 does not indicate anywhere the mandatory requirement that a striking out application must be undertaken within a specific time. Therefore, the plaintiff's argument that the 1st defendant was precluded from making an application to strike out the writ and statement of claim was clearly without merit. (paras 53 & 54)

(4) The court can make an order to strike out any pleading or indorsement or anything in at any stage of the proceedings. Although striking out application must be made as soon as possible, the court will not refrain from striking out a statement of claim even after commencement of trial. This is so because the court would otherwise waste its time and resources on a plea that is bound to fail. (para 57)

Case(s) referred to:

Anglo Irish Beef Processors International v. Federated Stevedoves Geelong and Others [1997] 1 Lloyd's Rep 207 ***(refd)***

Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman [1990] 2 CLJ 462; [1990] 1 CLJ (Rep) 633 HC ***(refd)***

Cargill Int SA v. CPN Tankers (Bermuda) Ltd "The Ot Sonja" [1993] 2 Lloyds Rep 435 ***(refd)***

Carrupaiya v. MBF Property Services Sdn Bhd & Anor [2000] 4 CLJ 116 HC ***(refd)***

Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors (1983) 2 MLJ 227 ***(refd)***

Leong Peng Kheong & Anor v. Dawntree Properties Sdn Bhd [2002] 1 CLJ 602 HC ***(refd)***

Nowest Holdings v. Muhibah Enginering Bhd [2004] 4 MLJ 481 ***(refd)***

Pyrene Co Ltd v. Scindia Navigation Co [1954] 2 QB 402 ***(refd)***

Riches v. Director of PP [1973] 2 All ER 935 ***(refd)***

Stage Line Ltd v. Foscolo Mango & Co Ltd [1931] All ER Rep 666 ***(refd)***

Stag Line Ltd v. Foscolo Mango & Co Ltd [1932] AC 328 ***(refd)***

Tang Woung Shiu v. Kun Yeung & Anor [2003] 1 HKC 195 ***(refd)***

Tapematic Spa v. Wirana Pte Ltd & Anor [2002] 4 SLR 953 ***(refd)***

Tengku Ali Ibni Almarhum Sultan Ismail v. Kerajaan Negeri Terengganu Darul Iman [1994] 2 CLJ 685 HC ***(refd)***

The Aries [1977] 1 Lloyd's Rep 334 ***(refd)***

The Beltano [1967] 1 Lloyds Rep 531 – Sup Ct WA ***(refd)***

The Captain Gregos [1990] 1 Lloyd's Rep 310 ***(refd)***

The Jhi Jiang Kou [1991] 1 Lloyd's Rep 493 ***(refd)***

The Kapetan Markos NL [1986] 1 Lloyd's Rep 211 ***(refd)***

The Merak [1964] 2 Lloyd's Rep 5127 ***(refd)***

The New York Star [1980] 2 Lloyd's Rep 317 ***(refd)***

The Pioneer [1995] 1 Lloyd's Rep 223 ***(refd)***

Legislation referred to:
Carriage of Goods by Sea Act 1950, art. III r. 6, ss. 1, 2, 4
International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of Brussels 1924, art. 19b), (c), (e)
Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d)

For the plaintiff - R Thormy; M/s Shook Lin & Bok
For the 1st defendant - J Joseph; M/s Josept & Partners

Reported by Amutha Suppayah

JUDGMENT

Ramly Ali J:

[1] These grounds of judgment are in respect of the 1st defendant's application to strike out the plaintiff's amended writ and statement of claim dated 28 February 1998 against the 1st defendant under O. 18 r. 19(1)(b)(c) and (d) of the Rules of the High Court 1980 (RHC 1980).

[2] The plaintiff's claim against the defendants is in respect of loss and damage suffered by the plaintiff as a result of the fraudulent misrepresentation in the Bill of Lading by the defendants which the plaintiff claimed to have breached the implied term of the contract of carriage.

Factual Background

[3] The plaintiff is a company incorporated under the laws of Malaysia and carries on at all material times, the business of local and international timber trading at 6th Mile, Kuala Kangsar Road, 30010 Ipoh, Perak.

[4] The 1st defendant is a company incorporated in the People's Republic of China and engages in the business of shipping containers. The 1st defendant has a address for service at Bock A, Lucky Tower, 3 Dongsanhuan Bei Road, Chaoyang District, Beijing 100027, People's Republic of China.

[5] The 2nd defendant is a company incorporated in Malaysia with its place of business at 3rd Floor, Room 301, Southern Bank Building, 21 Beach Street, 10300 Penang, Malaysia.

[6] By a contract No. 94HBM-002 and dated 4 March 1994, the plaintiff agreed to sell 56 containers of plywood ("the said cargo") to Hebei Metals & Minerals Import and Export Corporation ("the buyer"). A

[7] The terms of the contract of sale expressly stipulated that: B

(i) the shipment must be made before 30 April 1994;

(ii) the said cargo be loaded at a Malaysian Port;

(iii) the said cargo be discharged at Xingang Port, China; and C

(iv) payment be made by way of irrevocable letter of credit.

[8] In performing its obligations under the contract of sale, the plaintiff entered into a contract of carriage with the defendants, who were at all material times, engaged as the carrier for the said cargo. The contract of carriage is evidenced by a Bill of Lading No. PKXG-4018. The defendants issued and/or represented the said Bill of Lading as "shipped on board" on 30 April 1994 aboard the vessel "Tuo He V.103" at Port Klang. D

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[9] In reliance of the said representations on the Bill of Lading and acting on good faith, the plaintiff submitted the documents including the Bill of Lading dated 30 April 1994 to the negotiating bank for due payment pursuant to the letter of credit.

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[10] The said cargo arrived in Xingang, China on 27 May 1994 and on 7 June 1994, the said cargo was compounded by the Chinese Court by reason of the buyer rescinding the contract of sale and rejecting the said cargo. The buyer had also obtained an injunction to stop one Bank of China, Changsha from releasing funds pursuant to the letter of credit. G

[11] In the arbitration between the buyer and the plaintiff before the China International Economic and Trade Arbitration Commission, Beijing ("CIETAC"), CIETAC decided against the plaintiff. H

[12] An award was then made against the plaintiff in which the plaintiff is to pay the buyer the total sum of approximately US152,730 (including interest up to 20 September 1996) and RM187,821 (including the buyer's share of the arbitration fees and the plaintiff's legal fees and expenses). The plaintiff paid the compensation to the buyer accordingly on or about 11 October 1996. I

[13] By reason of the matters aforesaid, the plaintiff has suffered loss and damage.

1st Defendant's Application

[14] Enclosure 66, is the 1st defendant's application to strike out the plaintiff's amended writ and statement of claim under O. 18 r. 19(1)(b), (c) and (d) of the RHC 1980 on the ground that the plaintiff's claim is time-barred by the relevant applicable laws ie, the Carriage of Goods by Sea Act 1980 (Act 527) (COGSA) and the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of Brussels 1924 (the Hague Rule 1924).

The Plaintiff's Arguments

[15] In opposing the 1st defendant's application, the plaintiff argues that their claim against the 1st defendant is in respect of the loss and damage suffered by the plaintiff as a result of fraudulent misrepresentation in the Bills of Lading by the 1st defendant and therefore the plaintiff states that the Hague Rules 1924 and the COGSA is not applicable. In this respect, the plaintiff states that the Hague Rules is not applicable because art. III r. 6 of the First Schedule of Carriage of Goods by Sea Act 1950 is only relates to contractual liabilities in relation to the loading, handling, stowage, carriage custody, care and discharge of the Goods and does not extend to tortuous liabilities arising under the Bill of Lading.

[16] On the above arguments, the plaintiff submits that the plaintiff's claim against the defendants is not time-barred as claimed by the 1st defendant and prays that the 1st defendant's application to strike out the plaintiff's amended writ and statement of claim must fail and be dismissed with costs.

Issues To Be Determined By Court

[17] Issues to be determined by the court in the present application are as follows:

(a) whether the plaintiff's claim against the 1st defendant falls under the purview of the Hague Rules and the COGSA;

(b) whether the plaintiff's claim against the 1st defendant is time-barred; and

(c) whether the plaintiff's claim against the 1st defendant can be struck out on the ground of being time-barred.

Findings Of Court

[18] The subject matter of the plaintiff's claim against the 1st defendant is a shipping matter which involves on issuance of Bill of Lading and shipment from Malaysia. Therefore, the court is of the view that the COGSA, which in turn gives effect to the Hague Rules 1924 must apply.

[19] Section 2 of the COGSA clearly provides:

> Subject to this Act, the Rules set out in the First Schedule shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Malaysia to any other port whether in or outside Malaysia.

[20] The Rules referred to in this s. 2, relate to "Rules Relating to Bills of Lading" as provided under the First Schedule of the COGSA. These Rules were made by the International Conference on Maritime Law held at Brussels October 1922 and amended at a meeting held at Brussels in October 1923. They were first adopted and applied in the former Federated Malay States, Johore and the Straits Settlements and subsequently extended to apply throughout the Federation. (see: Explanatory Foot Notes to s. 2 of the COGSA. (Act 527).

[21] The COGSA gives force to the Hague Rules and provides for it's compulsory application to Bills of Lading and similar documents of title issued in relation to outward-bound cargoes. The method of enactment adopted is the method of attaching the international convention in a schedule to the Act. The COGSA was modeled after the UK Carriage of Goods by Sea Act 1924.

[22] The Hague Rules as enacted by the COGSA compulsorily apply in four (4) ways – ie, they only apply to outward-bound journey (s. 2); to contract of carriage covered by Bills of Lading and similar documents of title (s. 4, art. 1(b) of the Rules); to carriage of goods other than live animals and cargo carried on deck (art. 1(c); and the period from the time when the goods were loaded on to the time when they are discharged from the ship (art. 1(e). (see: *Pyrene Co. Ltd. v. Scindia Navigation Co.* [1954] 2 QB 402).

[23] The Rules are applied by the COGSA to only West Malaysia (s. 1) but are also effective in Sabah and Sarawak by virtue of the Merchant Shipping (Implementation of Conventions Relating to the Carriage of Goods by Sea and to Liability of Ship owners and others) Regulations 1960 of Sarawak and the Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961 of Sabah.

[24] In the present case, the plaintiff's claim against the 1st defendant clearly based on the Bill of Lading in connection with the carriage of goods (56 containers if plywood) by sea in ship from Port Klang (port in Malaysia) outward-bound to Xingang in China. Therefore, the court is of the view that the relevant provisions of the COGSA and the Hague Rules 1924 are compulsorily applicable.

Time-Bar Provisions Under art. III, r. 6 Of The 1st Schedule, COGSA

[25] The relevant part relating to time-bar limitation under the COGSA is found in art. III, r. 6 of the 1st Schedule, which *inter alia* provides:

> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one (1) year after delivery of the goods or the date when the goods should have been delivered.

[26] The said provision is clear that "the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one (1) year after delivery of the goods (actual delivery) or the date when the goods should have been delivered." Any suit brought after the one (1) year period is time-barred by virtue of the provision.

[27] It has been held that delivery for the purpose of the Hague Rules can take place when the goods are put at the disposal of the buyer ie, when the buyer has the opportunity to take possession of the cargo and not necessarily when the buyer has actual possession. (see: *The Beltano* [1967] 1 Lloyds Rep. 531 – Sup. Ct. WA).

[28] In the instant, the cargo arrived and stored in Xingang Port, China on 27 May 1994 and the goods were discharged at the disposal of the buyer. The 1st defendant has done their part in ensuring that the goods were delivered and discharged at the disposal of the buyer. So, for the purpose of the time-bar provisions under art. III, r. 6, the date when the goods were delivered or the date when the goods should have been delivered, is 27 May 1994. The fact that the buyer had rescinded the contract and rejected the goods does not in any way change the status of delivery of the goods for the purpose of art. III, r. 6 provisions. Therefore, any action, claim or suit in respect of loss or damage against the 1st defendant (as the carrier) must be brought or filed within one (1) year after 27 May 1994.

[29] The present suit was only instituted in Malaysia against the 1st defendant on 28 July 1997, some three (3) years later. This clearly shows that the suit was filed beyond the limitation period of one (1) year after 17 May 1994.

[30] The words "loss or damage" in the limitation provisions under art. III, r. 6 extend to loss or damage which is related to the goods. They do not refer only to physical loss or damage to the goods. The provisions in art. III, r. 6 must be given a wider constructions on "loss or damage" because it is fully consistent both with the purpose of the limitation provisions itself and with the broader purpose of the Hague Rules as a whole. In *Stage Line Ltd. v. Foscolo Mango & Co. Ltd.* [1931] All ER Rep 666, Lord Macmillan (at p. 677) commented on the UK COGSA 1924 (equivalent to our Malaysia COGSA 1950) as follows:

> It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the schedule have an international currency. As these rules must come under the consideration of the foreign courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.

[31] Again, in *Cargill Int. SA v. CPN Tankers (Bermuda) Ltd. "The Ot Sonja"* [1993] 2 Lloyds Rep. 435, the Court of Appeal (UK) held that the meaning of "loss and damage" in the limitation provisions should be harmonised with the established meaning of those words in s. 4 where it was held that "loss or damage" did

not only relate to physical damage of the goods but had a wider meaning; the words "loss or damage" in the limitation provisions extend to loss or damage which was related to the goods.

[32] In the present case, the particulars of "loss or damages" as claimed by the plaintiff against the 1st defendant in their amended statement of claim clearly fall within the definition of "loss or damage" as established in the above authorities cited ie, loss or damage which is related to the goods in question. It includes the total value of the goods as well as compensation paid to the buyer and arbitration and legal fees related to the goods.

[33] The word "suit" in art. III, r. 6 has been widely interpreted by the judiciary. It has been construed widely to include not only an action brought before the court but also covered proceedings by arbitration. This liberal view of the word "suit" is reflected in *The Merak* [1964] 2 Lloyd's Rep 5127 (CA), where Lord Justice Selles said the following:

> I can see no good reason for giving the word "suit" in this context the limited meaning which has been advanced. The Hague Rules *(sic)* are of international application, arbitration has long been a method of settling disputes agreed by parties to contracts for carriage by sea, and whilst it was agreed that there should be a period of limitation there is nothing to indicate that a step in an arbitration would not be as effective as a writ in an action unless "suit" can only have the meaning in our courts of an action. I do not find any authority which requires us so to hold.

[34] The word "suit" has been broadly used to cover not only a suit based on a breach of contract of carriage, but also one founded in tort. This was expressed by Justice Brooking in *Anglo Irish Beef Processors International v. Federated Stevedoves Geelong and Others* [1997] 1 Lloyd's Rep. 207 at p. 213 (Australia Supreme Court of Victoria, Court of Appeal) who said that:

> … when **Art III, rule 6** speaks of "suit" being brought within one (1) year, it comprehends not only action in contract, but also an action in tort.

[35] The relevant art. III, r. 6 is drafted in general and all-embracing terms: "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage …". The plaintiff in the present case, argues that the plaintiff's claim against the 1st defendant is based on tort of deceit and therefore

falls outside the ambit of the time bar limitation under art. III, r. 6. The plaintiff further argues that the claim is subject to time limit of six (6) years under the Limitation Act, but not under art. III, r. 6 of the Hague Rules.

[36] The court cannot agree with the plaintiff's argument on this issue. The court is of the view that it is important to give the phrase "all liability" its plain and ordinary meaning. The phrase "all liability" is crystal clear in that it discharges the carrier from each and every liability in respect of goods carried under a contract of carriage if a claim is not brought by the plaintiff within twelve (12) months.

[37] This all encompassing interpretation of "all liability" is also supported by Lord Wilberforce in *The New York Star* [1980] 2 Lloyd's Rep. 317 who expressed the following view:

> A further point made was that **clause 17** applied at most to actions for breach of contract; the stevedore's negligence as bailee, however, gave rise to an action in tort which was not governed by the time bar. Their Lordships' opinion on these arguments is clear. However adroitly presented, they are unsound, and indeed unreal. **Clause 17** is drafted in general and all-embracing terms: 'In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one (1) year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought unto; jurisdiction shall have been obtained over the Carrier and/or the ship by service of process of by an agreement to appear'. The reference to delivery of the goods shows clearly that the clause is directed towards the carrier's obligations as bailee of the goods. It cannot be supposed that it admits of a distinction between obligations in contract and liability in tort; 'all liability's means what it says'.

[38] From the judgment above, it is apparent that cl. 17 which is similar in drafting to art. III, r. 6 of the Hague Rules, is wide enough to cover all liability in tort. As long as the defendant carrier has carried the goods and made delivery, any liability arising out of that process will fall within the phrase "all liability". The New York Star was also followed in *The Captain Gregos* [1990] 1 Lloyd's Rep. 310 (CA), where Lord Justice Bingham expressed the view that "all liability" in art. III, r. 6 meant there is nothing to suggest that a distinction must be made between obligations in contract and liability in tort.

[39] "All liability" is the plain and ordinary phrase used in drafting art. III, r. 6. At this juncture, it is important to remember that Lord Atkin cautioned in *Stag Line Ltd. v. Foscolo, Mango & Co. Ltd.* [1932] AC 328 at pp 342-343 that:

> ... the Rules will often have to be interpreted in the courts of the foreign consignees. For the purpose of uniformity it is, therefore, important that the Courts should apply themselves to the consideration only of the words used without any predilection for the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.

[40] The widely drafted phrase "all liability" has also meant as being held by the Australia Supreme Court of New South Wales in *The Jhi Jiang Kou* [1991] 1 Lloyd's Rep 493 that even claims for misdelivery of goods carried by sea which gives rise to the tort of conversion must be subjected to art. III, r. 6 of the Hague Rules.

[41] Hence, even if the plaintiff had filed a claim for a tort of deceit, it would still have to be subjected to the one (1) year limitation period. Therefore, even if the plaintiff has a claim against the 1st defendant for back-dating the bill of lading, that claim would be time barred under art. III, r. 6 as the plaintiff did not file the claim within one (1) year after the delivery of the goods or the date when the goods should have been delivered on 27 May 1994.

[42] The purpose of the limitation provisions under art. III, r. 6 is to provide finality to all claims against the carrier or ship. In *The Pioneer* [1995] 1 Lloyd's Rep 223, Justice Phillips emphatically declared that "the object of the Hague Rules time limit is to protect ship owners from stale claims". In fact the effect of the limitation is by extinguishing both the claim as well as the remedy if the action is time-barred under art. III r. 6. This is indeed different from other limitation of time provisions which only bar the remedy, but not the substantive claim itself. There is a difference between a procedural time bar which extinguishes the remedy and a substantive time bar which extinguishes the claim as well.

[43] In *The Nordglimt (supra)*, Hobhouse J at p. 190, put it clearly as follows: A

> There can be little doubt that the reasoning of Roskill J involved accepting that Article III rule 6, had essentially a procedural character, He expressly based his decision upon authorities on the Limitation Acts 1939. The proceedings before the Court must have been brought in time otherwise they must fail. However, as was held in *Aries Tanker Corp. v. Total Transport Ltd.* [1977] 1 WLR 185, the discharge given by Article III, rule 6 is substantive not procedural. B
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> … But I do not think that sufficient recognition has been given by the Courts below, it is a time bar of a special kind *viz* one which extinguishes the claim not one which, as most English statutes of limitation and some international convention do, bars the remedy while leaving the claim itself in existence. Therefore, arguments to which much attention and refined discussion has been given, as to whether the charterer's claim is a defence, or in the nature of a cross-action, or a set-off of one kind or another, however, relevant to cases to which the Limitation Act 1939 or similar Acts apply, appear to me, with all respect, to be misplaced. The charterers claim, after May 1974 and before the date of the writ, had not merely become unenforceable by action, it had simply ceased to exist. C D E

[44] In *The Aries* [1977] 1 Lloyd's Rep. 334, the House of Lords held that the discharge given by art. III, r. 6 is substantive, not procedural; it discharges the carrier's liability and does not merely bar the cargo owner's remedy. Lord Wilberforce at p. 336, explained that the time bar in art. III, r. 6 did not serve merely to bar the remedy, but rather extinguished the cause of acting, discharging the carrier expressly from "all liability" if suit was not brought within one (1) year meaning that there could not be are suscitation of the action. F G

[45] Hence, that simple and usual meaning of that phrase should be applied by this court to extinguish all claims, including that for the tort of deceit brought by the plaintiff against the defendant because the suit was not file within the required one (1) year period stipulated in art. III, r. 6 of the Hague Rules. H

[46] Article III, r. 6 was designed to regulate the relationship between a carrier and a cargo-owner when goods were carried under a contract of carriage of goods by sea. Hence, in order to raise the defence of time bar under art. III, r. 6, Lord Justice I

Parker in *The Kapetan Markos NL* [1986] 1 Lloyd's Rep. 211 (CA) has suggested that a shipowner merely has to establish the following:

> If therefore the shipowner wishes to rely on the rule 6 discharge from liability he must establish first that the goods were carried under a contract of carriage by sea, next that suit to establish liability under the rules in respect of loss of or damage to the goods carried under the contract has not been brought within a year.

[47] All the defendant has to do in order to raise the time bar defence in the present case is as follows:

> **First,** prove that the goods were carried under a contract of carriage of goods by sea. This requirement is satisfied as the goods were shipped under a COSCO bill of lading No.PKXG-4018 dated 30 April 1994 issued in Port Klang. **Second,** establish that the Plaintiff's claim was not brought within twelve (12) months. Clearly, the present suit was not brought within twelve (12) months.

[48] Based on the above considerations, the court makes the following findings:

(a) that the plaintiff's claim against the 1st defendant falls under the purview of the Hague Rules and the COGSA; and

(b) that the plaintiff's claim against the 1st defendant is time-barred under art. III, r. 6 of the Hague Rules and the COGSA.

[49] The next issue is whether the plaintiff's claim against the 1st defendant can be struck out on the ground of being time barred under art. III, r. 6 of the Hague Rules.

[50] Order 18 r. 19(1) of the RHC 1980 states as follows:

> 19. Striking out pleadings and indorsements (Order 18, rule 19):
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court.

[51] The Federal Court in *Haji Hussin bin Haji Ali & Ors. v. Datuk Haji Mohamed bin Yaacob & Ors.* [1983] 2 MLJ 227 applying the principles of striking out as stated in the Rules of the High Court held that the defence of limitation of time is a good ground to suggest that the writ and the statement of claim is scandalous, frivolous or vexatious, prejudice, embarrass or delay or an abuse of court process an ought to be struck out. Wan Sulaiman FJ applied a passage from Russel J in *Riches v. Director of PP* [1973] 2 All ER 935, 939 said:

> In the light of those more recent authorities, I think, as I say, that perhaps the observations of this Court in *Dismore v. Hilton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action the limitation objection should or could prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a Defendant should be called on to pay large sums of money and a Plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action, which has already been barred by statute of limitations and must fail.

[52] In the present case, the defence of limitation under the Hague Rules 1924 has been pleaded by the 1st defendant in the amended statement of defence. Therefore, the defence of time bar under the Hague Rules can be raised. The 1st defendant is relaying on their substantive right to rely on the time-bar provisions under the applicable statute. For the same reasons as in the *Haji Hussin* case *(supra)*, the court is of the view that the 1st defendant should not be called on to pay large sums of money and the plaintiff be permitted to waste large sums of his own or the 1st defendants money in an attempt to pursue a cause of action, which has already been barred by the limitation of time in the COGSA/Hague Rules.

[53] On the issue of unconditional appearance as raised by the plaintiff, the court is of the view that there is nothing in O. 18 r. 19 of the RHC 1980, stating that to strike out the writ and statement of claim a conditional appearance must be filed first or that once an unconditional appearance has been filed, an interested party is precluded from making on application of striking out on the given grounds. In other words, the filing of a conditional appearance is not a prequisite for the filing of an O. 18 r. 19 application. The said O. 18 r. 19, certainly does not indicate anywhere the mandatory requirement that a striking out application must be undertaken within a specific time. (see: *Nowest Holdings v. Muhibah Enginering Bhd.* [2004] 4 MLJ 481; *Carrupaiya v. MBF Property Services Sdn. Bhd. & Anor* [2000] 4 CLJ 116; *Leong Peng Kheong & Anor v. Dawntree Properties Sdn. Bhd* [2002] 1 CLJ 602; *Bank Bumiputra Malaysia Bhd. & Anor v. Lorrain Esme Osman* [1990] 2 CLJ 462; [1990] 1 CLJ (Rep) 633).

[54] Therefore, the plaintiff's argument that the 1st defendant is precluded writ and statement of claim under O. 18 r. 19 of the RHC 1980 on the ground that the 1st defendant had entered an unconditional appearance is clearly without merit and cannot be accepted by the court.

[55] The plaintiff also raises the issue of delay in filing the striking out application by the 1st defendant. The plaintiff relies on the case of *Tengku Ali Ibni Almarhum Sultan Ismail* [1994] 2 CLJ 685. The case of *Tengku Ali* could be distinguished because in *Tengku Ali* the delay from the defence to the filing of the striking out application is five (5) years. However, in the present case, the application to amend the defence was allowed by the court on 30 October 2006, wherein the plaintiff did not object to the application, and the striking out application was filed on 3 January 2007, hardly two (2) months after the date of the amendment of the defence. There is no delay as asserted by the plaintiff.

[56] The 1st defendant's application to amend the defence was to plead the issue of limitation which the plaintiff did not object. The application was granted and two (2) months later as a result of the amendment, the 1st defendant filed the present application to strike out the plaintiff's writ and statement of claim. Therefore, it would defy logic that the basis of the present application ie, the amendment was not objected to, but the application to strike out is said to be a delayed application.

[57] The court can make an order to strike out any pleading or indorsement or anything in at any stage of the proceedings. Although striking out application must be made as soon as possible, the court will not refrain from striking out a statement of claim even after commencement of trial. This is so because the court would otherwise waste its time and resources on a plea that is bound to fail. (see: *Tang Woung Shiu v. Kun Yeung & Anor* [2003] 1 HKC 195).

[58] In *Tapematic Spa v. Wirana Pte. Ltd. & Anor* [2002] 4 SLR 953 the court held that while an application to strike out a pleading should be made as soon as possible, a late application was not doomed to failure.

Conclusion

[59] Based on the above considerations the court rules that this is a proper case for the court to exercise its discretion to allow the 1st defendant's application to strike out the plaintiff's writ and statement of claim under O. 18 r. 19(1)(b)(c)(d) of the RHC 1980. Therefore, the 1st defendant's application is allowed with costs.